United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*, —vs.— WALTER W. GRAMER, *Appellee.* Claimant of 213 Bottles, etc.	No. 12741

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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The issue of this appeal may be generally stated as follows: *Is acquittal of a defendant in a criminal action a bar to a subsequent civil in rem forfeiture action brought against the goods of the defendant where the charge in the civil libel is based on the same issue as the charge in the criminal information?*

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the Government in the former proceeding prevents judgment in the criminal action from barring the later *in rem* action.

The following excerpt from an article by W. G. McLaren of the Seattle Bar, entitled "The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," summarizes the facts and holding of the *Coffey* case:

> "In *Coffey v. U.S.*, decided in 1886, Coffey was defending a forfeiture proceeding brought by the United States against certain property said to belong to Coffey, the forfeiture being in the nature of penalty for an alleged violation of the Internal Revenue laws. Coffey set up as a special defense that the acts charged in the forfeiture information were the same as were contained in a certain criminal information theretofore filed against him, upon which information, after a trial before a jury, he had been found not guilty. The court said there was no question but that—
>
> " '* * * the fraudulant acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit.'
>
> " 'The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of the opinion that it is.'
>
> "After pointing out that one of the proceedings was civil and the other criminal, the court said:
>
> " 'Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United

States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*.'

"The court first denied the contention that the differences in the degree of proof required in the two proceedings — that is 'beyond reasonable doubt' and 'preponderance of proof' could affect the question of *res judicata*. The court said:

" 'The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, *did not exist*. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of *any* statutory punishment denounced as a consequence of the existence of the facts' (Italics ours)." (1935) 10 Wash. L. Rev. 198

It will be noticed that the Court limited its holding to the situation where the subsequent civil action is an *in rem* action for forfeiture.

The rule laid down in the *Coffey* case has been applied to each and every federal case since 1886 in which the elements present in the *Coffey* case have coincided. These elements are: (1) that the prior criminal action resulted in acquittal, (2) that the subsequent action was a civil libel *in rem* for for-

feiture, and (3) that claimant of the goods in the *in rem* action was the same person who was acquitted in the criminal action.

These three elements have been present, and the *Coffey* rule applied, in the following eleven cases:

1. *United States v. A Lot of Precious Stones and Jewelry*, 134 Fed. 61 (C.A. 6, 1905). Here a man and wife were proceeded against criminally for fraudulently importing jewelry into the United States in violation of the revenue laws. The man was acquitted, and the court, at the request of the Government, entered a *nolle prosequi* in the action against the wife. In a subsequent *in rem* action brought by the Government to forfeit the property which was alleged to have been fraudulently imported, the trial judge sustained a demurrer as to both the husband and wife, who appeared as claimants. On appeal, applying the *Coffey* principle, the Sixth Circuit affirmed the dismissal as to the husband, but reversed as to the wife, since the wife had not been acquitted in the criminal action. In the course of its opinion, the court said, at page 63:

> "It is clear that under the rule laid down in *Coffey v. U.S.*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684, approved in *Boyd v. U.S.*, 116 U.S. 616, 634, 6 S. Ct. 524, 29 L. Ed. 746; *U.S. v. Zucker*, 161 U.S. 475, 478, 16 S. Ct. 641, 40 L. Ed. 777; and *Stone v. U.S.*, 167 U.S. 178, 184, 17 S. Ct. 778, 42 L. Ed. 127, the acquittal of Schmidt operated as a bar to the further prosecution of the suit *in rem* so far as it concerned him."

2. *United States v. Seattle Brewing & Malting Co.*, 135 Fed. 597 (N.D. Wash., 1905). The defendant had

been acquitted in a criminal prosecution for causing to be placed in interstate commerce certain casks containing bottled beer, misbranded as containing soda water. Later the Government brought a civil action for forfeiture of the product. District Judge Hanford overruled the Government's demurrer to defendant's plea of *res judicata*, saying:

> "The question whether the Government, after having been defeated in the prosecution of a criminal case against the defendant for the doing of a prohibited act, may by waging a civil action against him, enforce the provisions of a penal statute by condemnation of property as forfeited and compelling the defendant to pay a fine, was learnedly discussed and finally determined by the Supreme Court of the United States in the case of *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684. In later decisions by the Supreme Court the *Coffey* case has been referred to but without modifying or departing from the rule which it established. See *Stone v. United States*, 167 U.S. 178, 196, 17 S. Ct. 778, 42 L. Ed. 127. The affirmative allegations of the answer bring this case fairly and fully within the rule of the *Coffey* case, and this court cannot hesitate in its duty to overrule the demurrer interposed in behalf of the Government."

3. *United States v. Rosenthal*, 174 Fed. 652 (C.A. 5, 1909). In this case the defendants had been acquitted of the crime of smuggling. Thereafter a libel was brought by the Government against the property which was the subject of the alleged smuggling. The libel was dismissed by the trial judge, and on appeal the Circuit Court affirmed, holding in a *per curiam*

opinion that the lower court had properly applied the *Coffey* case.

4. *Sierra v. United States*, 233 Fed. 37 (C.A. 1, 1916). Here the First Circuit followed the Fifth Circuit in holding that acquittal of a criminal charge of smuggling was a complete bar to an *in rem* action for forfeiture. The *Coffey* case was cited and approved.

5. *United States v. 2,180 Cases of Champagne*, 9 F.(2d) 710 (C.A. 2, 1926). The defendant-claimant in this case had been tried and acquitted of attempted violation of the Prohibition Act by transporting liquor within territorial waters. The District Judge in the ensuing *in rem* action against the liquor decreed condemnation. The Circuit Court reversed, saying in part at page 712:

> "It is clear that the criminal charge was attempted violation of the Prohibition Act by transporting liquor within territorial waters, and the defense was that she was seeking a harbor of refuge. A necessary consequence of acquitting on this charge, after such a defense. was a holding in substance that on December 7th the crew of the *Zeehound* (including appellant) had no criminal intent and were running for refuge instead of running rum. Under the cases cited * * *, it is impossible for the Government to say (as it substantially attempts to do in one portion of this libel)—'You may have been running for a harbor of refuge without present intention of violating the Volstead Act, but we will hold you civilly for not having the manifest (R.S. Sec. 2806) and trying to smuggle liquor into the country.' It is quite unnecessary to discuss the

matter further, the principle is too well known; that it has not always met with approbation in the State courts (*People v. Snyder*, 90 App. Div. 422, 86 N.Y.S. 415) is unimportant."

6. *United States v. Gully*, 9 F.(2d) 959 (S.D. N.Y., 1922). Gully was acquitted of the criminal charge of importing liquor into the country. Subsequently the Government brought a forfeiture action against the liquor and the libel was dismissed on authority of the *Coffey* case.

7. *National Surety Co. v. United States*, 17 F.(2d) 369 (C.A. 9, 1927). One Osborne was discovered by prohibition officers in the act of transporting intoxicating liquor by automobile in violation of law. Upon criminal trial for unlawful possession and unlawful transportation of the liquor, Osborne was acquitted. The Government thereafter filed a libel *in rem* against the automobile. This court in a *per curiam* opinion, signed by Judges Gilbert, Rudkin and Dietrich, after quoting extensively from the *Coffey* case, held the criminal acquittal a bar to the forfeiture action.

8. *Castro v. United States*, 23 F.(2d) 263 (C.A. 1, 1927). Castro was acquitted of the criminal charge of unlawful possession of intoxicating liquor. The Government then brought an *in rem* action against the liquor for forfeiture. The court held (1) that the libel was defective in certain respects, not necessary to consider here, and (2) even if the libel were cured, the action would be barred by Castro's acquittal. In the course of its opinion, the court said:

"And the record in No. 3300, made a part of

the answer, discloses that the criminal information against Castro was dismissed shortly after the libel was filed and before the filing of the answer; and as the fact there put in issue—whether the liquors in question were lawfully possessed by the respondent (claimant here)—was one of the facts that would be put in issue by the libel, if properly drawn, the judgment of dismissal in the criminal action, the parties to the two proceedings being the same, would be conclusive as to the fact in the libel suit. *Coffey v. United States*, 116 U.S. 436, 443, 6 S. Ct. 137, 29 L. Ed. 634. In this situation the District Court was without authority to enter a decree of forfeiture and should have ordered the liquors returned to the claimant."

9. *United States v. 119 Packages, Etc. of Z-G Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936). In this case the Government brought an *in rem* action under the Pure Food & Drug Act.[1] Claimant of the merchandise moved to dismiss on the ground that his demurrer had been sustained in a previous criminal action instituted by the Government in the Northern District of Illinois. The court held that since it appeared that the demurrer in the previous action had gone to the merits rather than to a formal or technical defect, the prior criminal action was *res judicata*, and the libel was dismissed. The instant case is stronger than the cited case in that the record here

[1]Except as hereinafter stated, there is no difference significant to this appeal between the Federal Food and Drugs Act of 1906 and the Federal Food, Drug and Cosmetic Act of 1938, which amended it. Therefore, we shall refer to the Acts simply as the Pure Food and Drug Act.

shows that the criminal case went to trial on the merits of the very issue which the Government now seeks to relitigate.

10. *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940). This case was an attempt by the Government, after *United States v. 119 Packages, Etc. Z-G Herbs, supra*, was decided, to obtain a decision contrary to that rendered by the New York district judge in that case. The same product and the same claimant were involved. The Sixth Circuit gave the Government short shrift in a unanimous decision. It followed the New York decision in holding the acquittal in the Illinois criminal case to be a bar to further libel actions:

> "Upon an appeal from a judgment rendered against the appellant for misbranding articles in violation of Section 8 of the Pure Food & Drug Law, 21 U.S.C.A. §10.
>
> "It appearing from the stipulation of facts that the articles sought to be condemned are the identical articles that formed the basis of an indictment against appellant in the District Court of the United States for the Northern District of Illinois, Eastern Division, in which court the indictment was, upon demurrer, dismissed because showing on its face that statements, designs or devices alleged to have been borne by the package were not statements of curative or therapeutic effect within the language of the statute, in consequence of which the indictment was held not constituting an offense against the United States, and it being the view of the court that the decision of the District Court of Illinois is *res judicata* of the present issues, the decision

there being upon the merits with respect to the charge of misbranding; it is hereby ordered that the judgment be and it is hereby reversed. *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 161, 3 A.L.R. 516; *United States v. Barber*, 219 U.S. 72, 31 S. Ct. 209, 55 L. Ed. 99; *Coffey v. United States*, 116 U.S. 436, 445, 6 S. Ct. 437, 29 L. Ed. 684. To the same effect is *United States v. 119 Packages, Etc.*, D.C. N.Y. 15 F. Supp. 327."

11. *United States v. One DeSoto Sedan*, 180 F.(2d) 583 (C.A. 4, 1950), affirming 85 F. Supp. 245 (E.D. N.C., 1949). One Smith was tried and acquitted of the crime of "removal, deposit and concealment of two gallons of distilled spirits upon which the duties to the United States had not been paid." Later the Government brought an action *in rem* to forfeit the automobile used by Smith in committing the alleged violation. The District Court dismissed the libel on the authority of the *Coffey* case. Upon appeal the Fourth Circuit affirmed. Its *per curiam* opinion, which at this writing is the latest on the subject, deserves to be quoted in its entirety:

"This case cannot be distinguished from *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684; and the judgment below will be affirmed on the authority of that decision. 85 F. Supp. 245. It is argued that subsequent decisions of the Supreme Court have weakened the authority of the *Coffey* case; but that case has never been overruled. On the contrary, in one of the cases chiefly relied upon by the United States, the Supreme Court was at pains to distinguish it. See *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917."

In addition to the above eleven cases, federal courts elsewhere have recognized and approved the *Coffey* doctrine, but have held it inapplicable because one or more necessary elements were lacking.

The Supreme Court itself has on several occasions restated and approved the *Coffey* principle. Thus in *United States v. Zucker*, 161 U.S. 475 (1895), claimants in an *in rem* proceeding asserted that they had the right to be confronted with the witnesses against them in accordance with the Sixth Amendment of the Constitution. There had been no prior criminal action against them and the *Coffey* doctrine was therefore not directly in issue. The Court, in rejecting claimants' contention that the Sixth Amendment applied, after discussing the *Coffey* case, observed:

> "That case is an authority for the proposition that if the present defendants had been proceeded against criminally on account of the same acts and facts that must be shown in order to sustain this action under the statute of 1890, and had been acquitted, the verdict and judgment of acquittal would have barred a subsequent civil proceeding, based on the same acts and facts, and instituted to enforce a forfeiture or to recover the value of the merchandise forfeited."

We should also perhaps note in passing that the *Coffey* rule has been extended by several federal courts to cover other situations, but we believe it to be beyond the scope of this appeal to consider such cases. See as example cases: *United States v. Salen*, 244 Fed. 296 (S.D. N.Y., 1917); *Chin Kee v. United States*, 196 Fed. 74 (W.D. Tex., 1912).

Exhaustive research by appellee has not disclosed

a single federal case which has retreated in any way from the holding of the *Coffey* case where the necessary elements for its application have been present. Appellant has not cited and we have not found a SINGLE federal case brought under ANY federal statute holding that a civil *in rem* action for forfeiture can be maintained where the claimant has been previously acquitted of a criminal charge based on the same underlying facts.

II. *Res judicata* bars subsequent action under the Pure Food & Drug Act where the prior adjudication involved a different shipment of the identical product.

The parties to this action have stipulated to the following facts (See R. 21-23):

1. That the contents of the bottles involved in this proceeding are identical in all material respects with those involved in the criminal proceeding.

2. That the labeling in issue is in all material respects the same as that involved in the criminal action. In short, the branding of the bottles in the two actions is identical.

3. Walter W. Gramer, claimant herein, is the same person as the defendant in the previous criminal action.

4. The criminal action was decided in defendant's favor "after a trial on the merits of the issue of whether the drug was misbranded within the meaning of 21 U.S.C. 352(a)."

The charging paragraphs in both libels forming this consolidated action (Paragraph 3 of Cause No.

15432 (R. 4) and paragraph 3 of Cause No. 15426 (R. 11)) are almost verbatim the same as the charging paragraph in the criminal action (R. 25). The crux of each is an allegation, "That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid * * * was misbranded within the meaning of 21 U.S.C. 352(a) * * *."

It is thus stipulated that all of the elements of the *Coffey* case are here present.

The sole question remaining for discussion is whether the doctrine of *res judicata* for purposes of Pure Food & Drug legislation applies to successive shipments of the same product. This question was emphatically answered in the affirmative by this court in *Geo. H. Lee Co. v. United States*, 41 F.(2d) 460 (C.A. 9, 1930).

In that case the Government contended that the dismissal of a libel covering a different shipment of the claimant's product could not be urged as *res judicata* of a separate and subsequent libel based upon a different shipment. Circuit Judge Dietrich, in an opinion in which he was joined by Judges Rudkin and Wilbur, dismissed the Government's contention in the following words:

> "Even were it held that technical identity in cause of action fails because the two proceedings relate to two different lots of the same compound and to labels or brands physically different though in form and meaning the same, it still remains true that the only real issue decided in the former proceeding is the one real underlying issue in the instant proceedings, that is, the re-

lation of a certain brand to a certain preparation, common to both suits. The case therefore is clearly within the narrowest application of the principle of judicial estoppel. In *Mitchell v. First National Bank*, 180 U.S. 471, 21 S. Ct. 418, 421, 45 L. ed. 627, the Supreme Court said:

" 'We are of the opinion that the bank was concluded by the judgment in the state court. In the recent case of *Southern P. R. Co. v. U. S.*, 168 U.S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18, 27, we said, after an extended examination of the adjudged cases, that "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them".'

"Manifestly the purpose of this principle or rule would be frustrated if the view for which the government contends were to be sustained. If the government is not bound by an adverse

judgment, neither is the appellant. Hence, without modifying its formula or changing its labels, it could, notwithstanding the decree herein, ship its preparation into other territory, and indeed into the same territory, with the hope of a more favorable result elsewhere or next time should the government bring other libels. And, instead of 'peace and repose of society,' the result would be chaos and endless turmoil."

Accord: *United States v. 15 Cases of Bred Spred*, 35 F.(2d) 183 (C.A. 7, 1928).

It will be seen that the criterion used by this court in the first paragraph quoted was whether "the one real underlying issue * * * [is] common to both suits." This is the same test as that used by the Supreme Court in the *Coffey* case (See 116 U.S. 436, 441-444).

The Government evidently accepted the cue offered it in the last quoted paragraph from the *Lee* case and now itself invokes in its favor the doctrine which it contended against in that case. Thus in *United States v. 17 Cases, more or less, of Nue-Uvo*, 1 C.C.H. Food, Drug & Cosmetic Reporter, paragraph 7133 (N.D. Ill., Oct 11, 1949), the Government's motion for summary judgment was granted upon its showing that it had prevailed in a prior action against a separate shipment.

Some years after the *Lee Co.* case was decided, another case relating to the same claimant and posing the same issue was presented to the Eighth Circuit in a somewhat different context. There a previous libel action by the Government under the Pure Food and Drug Act had been dismissed, whereupon the Fed-

eral Trade Commission instituted administrative proceedings against the claimant concerning a separate shipment. Despite the fact that the charges instituted by the Federal Trade Commission were under an entirely separate statute and the procedure to be followed was different from that which was followed in the court action, the Eighth Circuit held without hesitation that the doctrine of *res judicata* applied. In so holding the court commented as follows:

> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties. If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceedings, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it.
>
> "The contentions of the respondent that the court in the libel proceeding merely determined that the petitioner had not intentionally misrep-

resented the therapeutic qualities of its product, whereas the Commission in the proceedings before it ruled that the petitioner's representations were untrue and misleading, is not borne out by the record. The court in the libel proceeding determined that the representations, directly challenged and distinctly put in issue by the government, were not false, and, in doing so, necessarily determined that the product of the petitioner was a remedy for the three kinds of worms in poultry. The Commission, on the other hand, has determined that the representations upon which the libel proceeding was based were in fact false and misleading."

In conclusion, the court echoed the test used by this court in the prior *Lee* case and the Supreme Court in the *Coffey* case:

> "The main underlying issue in both the proceedings was the same, namely,—Are the representations made by the petitioner false because the product has not the therapeutic qualities claimed for it?" *Geo. H. Lee Co. v. Fed. Trade Comm.*, 113 F.(2d) 583 (C.A. 8, 1940)

The *Lee* cases were recently approved and followed in *United States v. Willard Tablet Co.*, 141 F.(2d) 141, 152 A.L.R. 1198 (C.A. 7, 1944) where a problem converse to that determined in the second *Lee* case was presented. There a hearing before the Federal Trade Commission had resulted in favor of the defendant. The Government then instituted a libel under the Pure Food & Drug Act against a subsequent shipment, alleging misbranding. The court sustaining the defense of *res judicata*, holding immaterial the fact that the procedure and proof before the Fed-

eral Trade Commission differed from that before the court. It pointed out that the true criterion of whether *res judicata* would apply was whether the underlying issues in both actions were essentially the same.

Another cogent opinion applying the doctrine of *res judicata* where the second cause of action is based on acts separate from the first is *Southern Pacific Co. v. Van Hoosear*, 72 F.(2d) 903 (C.A. 9, 1934). The latest United States Supreme Court decision applying the rule is *United States v. Munsingwear, Inc.*, 95 L. Ed. 70 (1950).

For purposes of the *Coffey* doctrine, acquittal in the criminal action is an adjudication of the "underlying issue," which is whether the defendant has committed the offense, and not merely whether the Government has been unable to prove its case beyond a reasonable doubt. To use a phrase from a Kansas opinion quoted by appellant at page 33 of its brief, the higher standard of proof "is either without any significance at all in this connection or decisive." Obviously the federal courts in the *Coffey* case and the eleven cases hereinbefore discussed which have applied it, regarded the higher standard of proof as being "without any significance at all." This fact is established conclusively by the language used in the eleven opinions.

Thus in *United States v. Gully*, 9 F.(2d) 959 (S.D. N.Y., 1922) the third count of the indictment in the criminal action was "that the defendant, Don Gully, imported and brought into the United States the liquor in question." The court in finding that acquittal on

this count barred a subsequent civil *in rem* action, said "by the verdict it was determined that he had not brought it [the liquor] into the United States." In *United States v. 2,180 Cases of Champagne*, 9 F. (2d) 710 (C.A. 2, 1926) the court said:

> "It is clear that the criminal charge was an attempted violation of the Prohibition Act by transporting liquor within the territorial waters and the defense was that she was seeking a harbor of refuge. A necessary consequence of acquitting on the charge after such a defense was a holding that in substance on December 7 the crew of the Zeehound (including appellant) had no criminal intent and were running for refuge instead of running rum."

The same rule of law is expressed in the *Coffey* opinion itself as follows:

> "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist."

The issue determined in the criminal action here was "whether the drug was misbranded within the meaning of 21 U.S.C. 352(a)" (R. 22). This is the very issue which appellant now seeks to relitigate. To paraphrase the opinions in the *Gully* and *Coffey* cases, it was determined by the decision of Judge Joyce in the criminal case that Sulgly-Minol was *not* misbranded within the meaning of 21 U.S.C. 352(a). In this case the record *affirmatively* shows that the decision in the criminal case was based on a finding

against the Government on the issue of misbranding, not on failure by the Government to prove its case beyond a reasonable doubt. Hence, the Government admits that the underlying issue raised in the instant civil proceeding was actually litigated and determined in the criminal case. The Government has stipulated that that issue was actually determined. Upon this record it matters not whether the prior proceeding was criminal, administrative, civil or even in admiralty! It was the trial judge's duty to dismiss the consolidated action, wholly apart from the particular application of the doctrine of *res judicata* known as the *Coffey* doctrine. Any contrary ruling would violate the most fundamental and general principles of *res judicata.* This principle has never been better expressed than in the language of the Supreme Court in *Southern Pac. R. Co. v. United States,* 168 U.S. 1, 48, 49 (1897), which is quoted with approval in *United States v. Munsingwear, Inc.,* at 95 L. Ed. 70, 71-2 (1950):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodifiied."

The final observation of the Supreme Court in the

Munsingwear opinion that, "The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation" (95 L. Ed. 73) applies with equal force to this case.

Appellant has stipulated that it has had its day in court on the very issue it raises here. It should not be allowed to relitigate that issue merely because the action in which the issue was adjudicated against it happened to be criminal in form.

III. Appellant's Brief

A. Introduction

The Government has referred at the outset of its argument to certain actions, which it concedes are irrelevant, against appellee and his product (App. Br. 8, 13-16). These allegedly include three seizure actions and one criminal action. After making such references, the Government states that it does not raise any issue as to whether these actions "could have any effect as *res judicata* in the present proceeding." (App. Br. 15). We regret that appellant has injected admitted irrelevancies into its brief. While we hesitate to dignify the Government's improper tactics with response, we shall make brief comment on these previous actions to clear the record of the inference which the Government obviously seeks to create.

The reason appellee did not defend the California and Texas seizure actions, which went by default, was that when they were instituted he was already litigating the instant consolidated action. The trouble of hiring and expense of paying counsel to attempt consolidation or to defend these actions outweighed

any advantage to be derived therefrom. We realize that the right of the Government to institute multiple libels has recently been upheld by a divided Supreme Court in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950). We recognize that such procedure is necessary to an effective administration of the Act in certain instances, particularly where there is adulteration. But we also believe that where, as here, the claimant has already secured a favorable ruling in the only prior contested proceeding, and where he is defending in good faith an action seeking to relitigate the same issue, no inference should be drawn by reason of his failure to hire counsel in distant places.

The Government concedes that a prior default judgment does not bar defense to later litigation based on a different cause of action. But it neglects to state the policy behind this rule, which is admirably expressed in Section 68 (d) of the Restatement of Judgments as follows:

> "If the defendant fails to interpose a defense in the prior action and judgment is given against him, the original cause of action is merged in the judgment; but there is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing a defense in the first action and for permitting plaintiff to obtain a judgment against him in that action. It may be that the action involved so small an amount that a defense to the action would cost him more than he would lose by failing to defend. It may be that the action is brought in a distant State where it would be difficult for him to produce the nec-

> sesary evidence of his defense. It would be most unjust to defendant to hold that his failure to defend should have the same result as though he had interposed a defense and it was found that the matters alleged in the defense were untrue."

The only purpose served by the California and Texas actions was to build up "the record" for the instant action. Obviously, those entrusted with enforcement of the Food & Drug laws must have the widest latitude of discretion as to whether to use the weapon of multiple seizure. We think that discretion abused where, as here, the weapon of multiple seizure is used for the sole purpose of inserting reference to such other actions in a brief where the Government concedes it has no legal relevancy.

Respecting the plea of guilty which is referred to on pages 13-14 of appellant's brief, the action there referred to was based upon labeling which appellee had abandoned and changed, at the request of the Pure Food & Drug Administration, even prior to institution of that action. The action was brought because appellee had inadvertently shipped a few bottles bearing the old label. His labeling has undergone several changes since that action was brought, most of which changes were made at the request of and with the approval of the Food & Drug Administration. Moreover, subsequent to the entry of the plea of guilty in that action, such plea was withdrawn with the approval of the court and substituted therefor was a plea of nolo contendere.

The entire purpose of such a plea is to protect the

defendant from having his plea, which amounts to a compromise construed as an admission against him in a subsequent action. See Housel & Walser, Defending and Prosecuting Federal Criminal Cases (2d ed. 1946), Sec. 302; 152 A.L.R. 253.

Again, the Government's remarks about appellant's product (App. Br. 12-13) are out of place since the merits of the product are not before this court. However, we wish to call the court's attention to two facts, (1) that Judge Joyce found for appellee "on the merits of the issue of whether" Sulgly-Minol was "misbranded within the meaning of" the Pure Food & Drug Act (R. 22) and (2) that sulphur, which is the basic element of Sulgly-Minol (R. 21) is generally regarded as efficacious in the treatment of rheumatic and skin diseases. Thus in Volume 21, page 543 of the current edition of the Encyclopedia Brittanica under "Sulphur" appears the following statement: "In chronic rheumatism sulphur waters are effectual both internally and as baths." It is also certainly within the knowledge and experience of this court that millions of Americans take "sulphur and molasses" as a spring tonic and at the first sign of a rheumatic complaint.

B. ***Appellant's brief ignores distinctions between res judicata and double jeopardy.***

The Government's brief fails to analyze the distinction between the doctrines of *res judicata* and double jeopardy. This distinction, which is crucial to an understanding of the issue of this appeal, is made by the writer of an annotation at 147 A.L.R. 991, entitled

"Doctrine of Res Judicata in Criminal Cases," in the following terms:

> "While both the doctrine of *res judicata* and the plea of *autrefois acquit* involve the maxim 'nemo debet bis vexari pro eadem causa.' (*Com. v. Moon* (1943) 151 Pa. Super. Ct. 555, 30 A. (2d) 704, there are important differences between the two. On the one hand, jeopardy may attach, so as to support a plea of former jeopardy (but not one of *res judicata*), before the rendition of any judgment. See 15 Am. Jur. 46, Criminal Law, sections 369 *et seq.*
>
> "On the other hand, the plea of *res judicata* may be available in cases (for example, where there is no identity of offenses in the two prosecutions) in which a plea of former jeopardy, *autrefois acquit*, or *autrefois convict* could not be sustained."[2] 147 A.L.R. 991, 997

There are, of course, instances where *both* defenses apply, but the doctrine of double jeopardy can have no application here for several reasons. First, the defense cannot ordinarily be raised in an *in rem* proceeding, which, it is held, does not place the claimant in jeopardy. Second, and equally important, the episode or "offense" which forms the basis of this action, the placing of the goods in interstate commerce, is an "offense" distinct from that upon which the criminal action was based.

The classic statement of the doctrine of *res judicata*

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[2]Strictly speaking, the doctrine of double jeopardy is expressed in the Latin maxim "Nemo debet bis puniri pro uno delicto." Black's Law Dictionary (3rd ed. 1933) 1237. Thus, even the Romans recognized the distinction.

in criminal cases is the opinion of Mr. Justice Holmes in *United States v. Oppenheimer*, 242 U.S. 85 (1916), where he rejected the contention made by the Government that the doctrine of double jeopardy was intended to supplant the principle of *res judicata* in criminal cases. This doctrine has been recently applied in *Sealfon v. United States*, 332 U.S. 575 (1947). See also *Collins v. Loisil*, 262 U.S. 426 (1923); *Frank v. Mangrum*, 237 U.S. 309 (1915); McLaren, "The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases" (1935) 10 Wash. L. Rev. 198, *passim*.

The Government seeks to justify its intrusion of the doctrine of double jeopardy into this case on the theory that *Coffey v. United States* was decided on that ground rather than on *res judicata*. Its contention in this respect is self-defeating since it argues (a) the doctrine of double jeopardy cannot apply to a civil action, (b) *Coffey v. United States* was a civil action, and (c) *Coffey v. United States* was decided on the ground of double jeopardy. Apparently, it is appellant's view that the Supreme Court Justices who unanimously concurred in *Coffey* blunderingly misapplied the doctrine of double jeopardy and/or the scores of federal judges who have held *Coffey* to have been decided on *res judicata* committed mass judicial misinterpretation. But the misconstruction is solely appellant's. There are areas in which, as we have mentioned, the doctrines are not mutually exclusive. Appellant's brief seeks to capitalize on this fact.

Critical examination of the opinion of the Court in

the *Coffey* case reveals that the holding is squarely on the ground of *res judicata*. Thus, the Court said:

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in the criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*."

This choice of words is practically identical with the words used by the Supreme Court in its statement of the rule of *res judicata* in the leading case of *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1, 48, 49 (1897). The United States Supreme Court, in the most recent case in which it has applied *res judicata*, *United States v. Munsingwear, Inc.*, 95 L. Ed. 70 (1950), adopted and approved the language from the *Southern Pacific* case.

The sole reference to double jeopardy in the entire opinion of the Supreme Court in the *Coffey* case is its observation that one of the cases which it cites, *United States v. McKee*, 4 Dill. 128, was decided on that ground. How the court's observation that one of the cases it cites was decided on a certain ground can be parlayed into a statement that the case itself was decided on that ground is a mystery to us. The Government makes much of the fact that the case of *Stone v. United States* (See App. Br. 22) observes that the Court in the *Coffey* case cited

United States v. McKee. The *Stone* case goes no further. But again, the summation of the *Stone* holding at page 22 of the Government's brief is not a fair one. It should be remembered that the *Coffey* case was a holding that prior acquittal is a bar to a subsequent action for forfeiture *in rem.* The *Stone* case was not a forfeiture proceeding nor was it *in rem.* The real basis for the *Stone* case is summed up in *McLaren, supra,* at page 199, as follows:

> "Another interesting case is *Stone v. U.S.*, decided in 1897. That was a civil action in which Stone was being sued for conversion of certain timber which it was alleged he had cut and removed from the Government lands. He set up in bar that he had previously been acquitted by a jury on an indictment charging him criminally with the removal of the same timber. The Supreme Court refused to sustain this former acquittal as a bar. In doing so it is of interest to note that the court, as a 'makeweight,' pointed out that his acquittal in the criminal case might have been due to the difference in the degree of proof required in a civil and a criminal case, in this respect contradicting the opinion in the *Coffey* case. The real reason for holding the plea bad, however, was that: 'an essential fact had to be proved in the criminal case which was not necessary to be proved in the present suit,' referring to the fact that knowledge of the Government's ownership of the timber was an essential element in the criminal case. but was not an element of a civil liability for a conversion."

The *Coffey* opinion itself made it crystal clear that *res judicata* would not apply to a situation where in-

tent was a necessary element of one action but not of the other. The court said:

> "When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action."

In distinguishing the *Stone* case from the *Coffey* case, the court should keep in mind that intent is not an element in prosecution for shipment in interstate commerce of adulterated or misbranded goods. *Triangle Candy Co. v. United States*, 144 F.(2d) 195, 199 (C.A. 9, 1944) (construing 1938 Act); *Strong, Cobb & Co. v. United States*, 103 F.(2d) 671, 674 (C.A. 6, 1939) (construing 1906 Act). See *United States v. Johnson*, 221 U.S. 488, 497-98 (1911). It might be appropriate to mention that under the 1938 Act, section 333(b), if intent *is* found in a criminal action, the penalty may be increased. Intent is also not a necessary element to be proved in forfeiture proceedings under either the 1906 or 1938 Act.

Appellant is either unable or unwilling to understand the distinction between the doctrines of *res judicata* and double jeopardy. For example, it argues on page 42 of its brief that if a criminal case were terminated in conviction the Government would be barred from prosecuting a subsequent *in rem* pro-

ceeding involving a later shipment. On the contrary, under the doctrine of *res judicata*, the *defendant* would be barred from defending the subsequent civil action.

That the Supreme Court in the *Coffey* case held the *in rem* action barred by reason of prior adjudication rather than prior jeopardy is clearly evidenced by the following portion of the opinion, in which the court stated that the impact of prior *conviction* on a subsequent forfeiture proceeding was not before it:

> "Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence, in law, for a condemnation, in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence in law, for a conviction on a subsequent indictment under it, are questions not now presented."

If the *Coffey* case had been decided on double jeopardy, it would be immaterial whether the prior action ended in acquittal or conviction. The court's comment would be superfluous, since the subsequent action would be barred in either event. It should be borne in mind that the Government now takes the position in the administration of the Act, and the courts hold, that a prior judgment in the Government's favor in a forfeiture proceeding bars defense by the claimant in a later libel action involving a subsequent shipment. See *United States v. 17 Cases, more or less, of Nue-Uvo*, 1 C.C.H. Food Drug &

Cosmetic Reporter, paragraph 7133 N.D. Ill., Oct. 11, 1949). The same effect should be given to a prior conviction in a criminal action.

We have been unable to find a case where this precise issue has been passed on. But such a result is inferable from the opinion of this court in *Pinasco v. United States*, 262 Fed. 400, 402 (C.A. 9, 1920). In that case the court did not have to pass directly on the issue, but had this to say:

> "*Coffey v. United States*, 116 U.S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is authority for the proposition that an acquittal under an indictment under section 3257 is conclusive in favor of the accused on a subsequent trial of a suit *in rem* for forfeiture, where the existence of the same act or fact is the matter in issue. But that is far from saying that a conviction on an indictment under section 3257 may be availed of as a defense to a civil action for forfeiture based upon the same acts or transactions."

See also *In re Food Conservation Act*, 254 Fed. 893, 900-901 (N.D. N.Y., 1918).

The reason why the Government, having obtained a *conviction* in a case involving a prior shipment of the same product, could invoke the doctrine of *res judicata*, is that the underlying factual issue would already have been adjudicated in its favor. The following chart illustrates the limits within which the doctrines of *res judicata* and double jeopardy operate:

Same Episode

Criminal Action	*In Rem Action*
Acquittal	Government barred by *res judicata.*
Conviction	Claimant barred from defending by *res judicata.* Double jeopardy plea will not lie since claimant is not regarded as put in jeopardy by the *in rem* proceeding for purposes of Fifth Amendment. *Various Items of Personal Property v. United States,* 282 U.S. 577 (1930)

Separate Episodes

Criminal Action	*In rem Action*
Acquittal	Government barred by *res judicata.* Double jeopardy is not a defense, since while the "issue" is identical, the "offense" is distinct.
Conviction	Claimant barred from defending by *res judicata.* Double jeopardy is not a defense, since while the same factual issue is involved, the "offense" is distinct. Also, as stated above, claimant is not regarded as put in jeopardy.

The plea of double jeopardy is ordinarily limited to proceedings which are *criminal* in nature. The doctrine of *res judicata*, as applied to prior criminal actions, is not so restricted. It applies, the Supreme Court held in *Coffey v. United States*, to subsequent *civil in rem* proceedings for forfeiture of the defendant's product.

C. *Cases cited by appellant inapplicable*

The Government's brief relies almost exclusively upon five Supreme Court cases. These are *United States v. LaFranca*, 282 U.S. 568 (1931); *Various Items of Personal Property et al. v. United States*, 282 U.S. 577 (1934); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Murphy v. United States*, 272 U.S. 630 (1926); and *United States v. Nat'l. Assn. of Real Estate Boards*, 339 U.S. 485 (1949). We shall consider them in order.

Neither *Various Items* nor its companion *LaFranca* bears remotely upon the issue of this appeal. The issue in those cases was the impact of a prior *conviction* of defrauding and conspiring to defraud the United States of taxes on liquor, upon subsequent actions for forfeiture of a distillery (*Various Items*) and for a money penalty (*LaFranca*).

In the *Various Items* case the court rejected defendant's plea that his prior conviction was a bar *on the ground of double jeopardy. Res Judicata* was neither raised by defendant nor discussed. Of course, if it had been, it would have been by the Government, not the defendant, since the "acts and facts" put in

issue in the criminal case were determined in its favor.

In *LaFranca* defendant contended that the Government's action was barred by section 5 of the Willis-Campbell Act, the statute under which the proceedings were brought. That section provided that a conviction for an act or offense under the National Prohibition Act should be a bar to "prosecution" under the Willis-Campbell Act (282 U.S. 571). The Court was asked to find that the word "prosecution" embraced an action to recover a penalty, and that if such action were not embraced within the term "prosecution," that the Willis-Campbell Act was unconstitutional in that it sanctioned double punishment. The Supreme Court held that it was unnecessary to pass upon the constitutional issue since, in its opinion, the word "prosecution" as used in the Act, embraced an action for a money penalty. The decision, therefore, that the second action was barred turned entirely upon construction of section 5 of the Willis-Campbell Act. The opinion of the Court states at page 570 that "pleas of former jeopardy and of *res judicata* were overruled by the district court." There is no further reference in the entire opinion to the issue of *res judicata*. Again, as in the *Various Items* case, the proper party to raise the issue of *res judicata* would have been the Government and not the defendant.

It should be noted that neither opinion cites either the *Coffey* case nor any of the federal cases applying the doctrine laid down therein. The obvious reason for this was that the Government did not raise the is-

sue of *res judicata*, and there was no occasion to discuss the *Coffey* doctrine.

The cases of *Murphy v. United States*, 272 U.S. 630 (1926) and *United States v. Nat'l. Assn. of Real Estate Boards*, 339 U.S. 485 (1950) should be considered together since in each case the second action brought by the Government after prior acquittal in a criminal action was for *injunctive* relief. There is a sharp difference between actions of injunction and forfeiture. Each has its separate purpose. This fact was recognized by the authors of the Federal Food, Drug & Cosmetic Act of 1938 by the inclusion of both remedies. The purpose of an injunction is to enjoin a defendant from performing *future* unlawful acts. This is clearly recognized in both the *Murphy* and *Nat'l. Assn. of Real Estate Boards* opinions. Forfeiture proceedings, on the other hand, do not seek to prevent future unlawful acts, since the very basis of a forfeiture action is that an unlawful act has already allegedly been committed. In the case of the Pure Food & Drug Act the unlawful act is the introduction of a misbranded or adulerated article in interstate commerce.

This distinction is carefully drawn by the Court in the *Nat'l Assn. of Real Estate Boards* opinion in footnote 6 on page 493. There the Court in commenting on *Helvering v. Mitchell*, 303 U.S. 391 (1938) points out that the Court in the latter case considered the situation before it

> "distinct from *Coffey v. United States*, 116 U.S. 436, 29 L. Ed. 684, 6 S. Ct. 437 which held that the facts ascertained in a criminal case as be-

> tween the United States and the claimant could not be again litigated between them in a civil suit which was punitive in character."

Then the Court, distinguishing the injunctive proceedings which were before it, from the *Coffey* case, said:

> "The civil (injunction) suit aims to put an end to the restraint not to impose punishment for past acts." (Material in parenthesis supplied)

The crucial difference between the *injunctive* provision on the one hand and the *criminal* and *seizure* provisions on the other of the Food, Drug & Cosmetic Act of 1938, is that no *penalty* or *punishment* is contemplated by the injunctive provision unless, of course, the injunction is later disobeyed. The injunctive provision was introduced into the Pure Food & Drug Act by the Food, Drug & Cosmetic Act of 1938. Prior to that time the only means of enforcement were criminal and forfeiture actions. In 1937 several competing bills to amend the 1906 legislation were before the Congress. In its report to Congress for the year ending June 30, 1937, the Food & Drug Administration posed several questions regarding proposed changes to the then existing law. Included was the question of whether the proposed injunctive provision should be a substitute for or an addition to existing enforcement procedures. The Administration asked this question:

> "4. Should false advertising of foods, drugs, therapeutic devices and cosmetics be controlled through injunctions and cease-and-desist orders, *which carry no penalty* for the initial offense or for subsequent offenses up until the date the in-

> junction or order becomes effective, or should a deterrent to the commission of these offenses be set up by *providing penalties for their initial commission?*" (Italics supplied)

The above question was quoted from Toulmin, "A Treatise on the Law of Foods, Drugs & Cosmetics" (1942 Ed.) §4, pp. 12-13).

The foregoing question demonstrates that the Food & Drug Administration recognizes the distinction it now fails to draw. As the *Nat'l. Assn. of Real Estate Boards* opinion so clearly points out, the reason *Coffey* does not apply to *injunctive* proceedings is that *no penalty* is involved. It should hardly be necessary to reemphasize that the *Coffey* case itself was careful to limit the operation of its rule to cases where the particular penalty involved was the forfeiture *in rem* of the claimant's product.

The final case to be considered is *Helvering v. Mitchell*, 303 U.S. 391 (1938). Again we wish to quote the language of the Supreme Court in the *Coffey* case to show how carefully it delineated the boundaries of its ruling:

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a *judgment of acquittal* has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, *on a subsequent trial of a suit in rem by the United States*, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*." 116 U.S. 433 (Italics supplied)

Helvering v. Mitchell was nothing more or less than a straight application of the rule laid down by the Supreme Court in *Stone v. United States*, 167 U.S. 178 (1897). There the Court held that a civil *in personam* action brought primarily to reimburse the Government for financial loss would not be barred by prior acquittal. The following quotation from *Helvering v. Mitchell* demonstrates that the penalty sought to be recovered from Mitchell was regarded by the Court as reimbursement:

> "The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and *to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.*" 303 U.S. 401 (Italics supplied)

In both of the two latest cases relied upon by appellant, *Helvering* and *National Assn. of Real Estate Boards*, the court was careful to point out that its ruling did not detract from the *Coffey* doctrine. The very fact that the Supreme Court has always been careful to state that its rulings do not impinge upon *Coffey* is the best evidence that the *Coffey* doctrine is still the law. This was the very reasoning used last year by the Fourth Circuit in its decision in *United States v. One DeSoto Sedan*, 180 F.(2d) 583 (C.A. 4, 1950). In that case the Government made the same contention which it raises here, to-wit: that "more recent Supreme Court decisions have for practical purposes delimited the scope of the *Coffey* case

to the point of extinction" (App. Br. 10). In the course of its opinion the Fourth Circuit said:

> "It is argued that subsequent decisions of the Supreme Court have weakened the authority of the *Coffey* case; but that case has never been overruled. On the contrary, in one of the cases chiefly relied upon by the United States, the Supreme Court was at pains to distinguish it. See *Helvering v. Mitchell*, 303 U.S 391, 58 S. Ct. 630, 82 L. Ed. 917."

The Government, nothing daunted, urges on this court the same contention which was rejected by the Fourth Circuit and what is more, again uses *Helvering v. Mitchell* as its shibboleth.

D. *The Coffey principle applies to forfeiture proceedings under the Pure Food & Drug Act.*

Appellant's final effort to distinguish the *Coffey* case is based on its assertion that the forfeiture provision of the Federal Food, Drug & Cosmetic Act is not in the nature of punishment (App. Br. 36-41). This is a desperate attempt to tailor an argument to fit *Helvering v. Mitchell*, 303 U.S. 391 (1938), in which the Supreme Court declared that *Coffey* applies only to civil actions penal in character. In this phase of its argument, appellant overlooks that the courts have in fact applied the *Coffey* doctrine to the forfeiture provisions of the Pure Food & Drug Act. *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940), *United States v. 119 Packages, etc., of Z-G Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936). Since the *Stanley* decision was not rendered until some two years after *Helvering v. Mitchell*, the Sixth Circuit,

in reaching the conclusion it did, must have found that forfeiture proceedings under the Pure Food & Drug Act satisfy the requirements of *Helvering v. Mitchell* of a civil action penal in character.

To support its contention that the forfeiture sanction of the Act is "remedial" rather than "penal" or "punitive," appellant relies chiefly upon the language of 21 U.S.C. 334(d) (App. Br. 38-39). This provision permits the owner of a condemned article to recover his property under special circumstances by invoking the discretion of the court and by putting up a bond. Appellant asserts that inclusion of such a provision definitely places the forfeiture sanction of the Pure Food & Drug Act in the "remedial" category. By the same token, most, if not all of the statutes, under which the eleven cases previously cited by us arose, must also be classified as "remedial" since each of them contains provisions to the same effect as 334(d). For example, 18 U.S.C.A. 3617, formerly 18 U.S.C.A. 846, provides that in any proceeding for forfeiture relating to liquors, the seized articles may be returned to claimant under the same conditions as those outlined in the Pure Food & Drug Act.

Respecting appellant's further observation that the seizure and criminal provisions of the Federal Food, Drug & Cosmetic Act are independent of each other and thus that *Coffey* should not apply (see App. Br. 41-42), we invite the court's attention to the fact that in many of the cases in which the courts have held an *in rem* proceeding for forfeiture barred by prior acquittal, the first action, terminating in the prior ac-

quittal, had been brought under an entirely separate and distinct statute. It is true, as appellant has pointed out at page 41 of its brief, that the forfeiture and criminal provisions of the Federal Food & Drug Act of 1906 were held to be independent by the United States Supreme Court. But what appellant overlooks and ignores is that the *Stanley* and *Z-G Herbs* cases were decided contrary to its contention under the self-same law, to-wit, the 1906 Act.

Appellant's brief fails to cite a single case holding that a forfeiture proceeding under *any* federal statute has ever been regarded as remedial in the sense that *Coffey* would not apply. Such proceedings are by their very nature penal and have been since Blackstone's day and still are so regarded. Thus, it is written at 50 Am. Jur. 34-5, Statutes, section 16:

> "The term (penal) is, however, frequently extended to include any action which imposes a penalty, *or creates a forfeiture,* as a punishment for the transgression of its provisions, or the commission of some wrong, or the neglect of some duty." (Italics and material in parenthesis supplied)

The similarity of this passage to the language used by Blackstone to express the same thought is striking. Blackstone said in 1765:

> "The same reason may with equal justice be applied to all *penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted.*" 3 Blackstone's Commentaries 161. (Italics ours)

All forfeiture proceedings are penal. It is impossible to argue, as appellant does, that some forfeiture pro-

ceedings are penal and some remedial. While it is true that Pure Food & Drug legislation is remedial in that its overall purpose is to protect the public, the same thing may be said of every piece of legislation containing criminal or civil sanctions. No law is passed for the sole purpose of inflicting punishment. However, many laws remedial in their overall purpose contain penal sanctions by means of which the legislature hopes that the remedial purpose of the legislation will be achieved. An outstanding example of this type of statute was the Volstead Act. The purpose behind insertion of forfeiture sanctions in that Act (41 U.S. St. at L. 315, 85 c. 85, Tit. II, §§25-27) was precisely the same as the purpose for which, appellant contends, forfeiture sanctions were included in the Pure Food & Drug Act. Just as misbranded drugs must be seized before they reach the consumer, so, the proponents of the Volstead Act asserted, intoxicating liquors were inimical to public health and their seizure was necessary to protect the consumer. Since several of the eleven cases applying the *Coffey* principle, which we discussed in the first part of this brief, were brought under the Volstead Act, it is clear that there is no merit in the hairsplitting distinction for which appellant contends.

Appellant asserts in its brief that the *Coffey* doctrine cannot apply here since the object of the instant consolidated action is to arrest the goods and not to punish the owner. Again, appellant is confronted with the fact that the courts in the aforementioned eleven cases applied the *Coffey* doctrine, although at the same time rendering lip service to the fiction that it

was the goods which were being punished. Any distinction between the punishment of a product and its owner is unrealistic. In this connection, the case of *United States v. Kent Food Corp.*, 168 F.(2d) 632 (C.A. 2, 1948) may be helpful. There the question presented was whether food condemned as adulterated in interstate commerce under Section 334 of the Act could be released for export. The trial judge decreed such release since it appeared that the food which was condemned was perfectly edible even though the mold count was higher than permitted under our food regulations. The Government's argument on appeal was "the court's holding has the effect of destroying the efficiacy of the original order of condemnation, since it permits and encourages *persons* subject to the Act to gamble upon compliance, knowing that *the penalty for violation* will be only an order for sale in the export trade" (168 F.(2d) 633) (Italics supplied). It will be seen that the Government recognizes that the real object of a forfeiture action, stripped of legal fiction, is to inflict a penalty on the person who places the goods in interstate commerce.

On appeal, Judge Clark, speaking for a unanimous court, reversed the trial judge. In the course of his opinion he said:

> "The power specifically given to the court to do only certain things upon condemnation of the articles excludes the possibility of according them a status they might originally have had, had they never been introduced into interstate commerce for the purpose of domestic sale. The clear purpose of the statute appears to be to visit the statutory penalties or sanctions upon articles

> thus found to be in violation of its provisions (Citing cases). The practical aspects of the situation would seem to support an intention that a violator of the Act may avoid the consequences of his wrong by thus exporting the outlawed goods to some foreign country which will receive them."

The court in speaking of a violator avoiding "the consequences of his wrong" recognizes that for all practical purposes the punishment is inflicted on the violator and not on the goods. See Toulmin, *supra*, §71, pages 95, 96. Also the *in rem* quality of a libel proceeding under the Act is dropped for all procedural purposes when a claim is filed by the owner of the goods. Moreover, under section 304(d) of the Act, upon condemnation, the property may be sold by the Government and "the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States." Manifestly, if the sole purpose of the Act were "remedial" the avails of sale in excess of legal costs and charges would be returned to claimant.

It is not surprising that differing effect is given to acquittal in a prior criminal action where the second action is limited to the recovery of a sum of money in the nature of a penalty or in the nature of reimbursement to the Government and where the second action is *in rem* for forfeiture of property. Actions *in personam* to recover damages in the nature of a penalty and *in rem* for forfeiture of property are by their very nature entirely different. See 37 C.J.S. 5, Forfeitures, section 1. From earliest times forfeitures

have been looked upon with disfavor by the law and have been enforced reluctantly and only when within both the spirit and letter of the law. See cases under Federal Digest, Forfeitures, section 1. The attitude of courts towards this type of proceeding is summed up in the maxim, "The law abhors a forfeiture."

Historically, seizure of a citizen's property by the sovereign was one of the great grievances against despotic power. The seriousness with which the founders of this country regarded this problem is reflected by their inclusion of the Fourth Amendment in the Bill of Rights. No one can say with assurance whether the present distinction for purposes of the doctrine of prior adjudication between forfeiture and penalty proceedings is a direct outgrowth of those early fears, but such connection is plausible. In any event, as this brief demonstrates, the distinction does exist. Any departure from it would necessarily involve a repudiation of the *Coffey* case and the long and unbroken line of federal decisions which have applied the distinction during the past 65 years to every type of federal statute under which a forfeiture proceeding has been brought.

IV. Conclusion

Appellant's brief, indeed its case, is essentially a petition for rehearing.

First, the libels seek a rehearing of the issue of whether Sulgly-Minol is "misbranded within the meaning of 21 U.S.C. 352(a)" (R. 22).

Second, appellant seeks a rehearing of its contention, decided adversely to it by the Sixth Circuit in *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940) and by the Southern District of New York in *United States v. 119 Packages, etc. of Z-G Herbs*, 15 F. Supp. 307 (S.D. N.Y., 1936), that the *Coffey* principle does not apply to the Pure Food & Drug Act.

Third, appellant seeks a rehearing of its contention, previously rejected by the Fourth Circuit in *United States v. One DeSoto Sedan*, 180 F.(2d) 583 (C.A. 4, 1950), that the *Coffey* case was overruled *sub silentio* by *Helvering v. Mitchell*, 303 U.S. 391 (1938).

Fourth, appellant, by implication at least, urges this court to reconsider its holding in *George H. Lee Co. v. United States*, 41 F.(2d) 460 (C.A. 9, 1930) that *res judicata* applies to successive shipments of the same product under the Pure Food & Drug Act.

Appellant even voices the traditional complaint of the petitioner for rehearing. It says since the *Stanley*, *Z-G Herbs* and *One DeSoto Sedan* opinions were short and adverse to it, the courts surely must have neglected to give sufficient consideration to the arguments it now re-raises. The reason why the opinions are growing shorter and shorter when courts are asked by the Government to find that a prior acquittal on a criminal charge is not a bar to a subsequent civil *in rem* forfeiture proceeding is clear. It is not that insufficient consideration is given to the Govern-

ment's arguments, but rather that the law on the subject is now so well settled as to render extended discussion unnecessary.

Respectfully submitted,

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